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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

RICKY COCHRAN, ALAIN BERREBI, and
JARAMEY STOBBE, individually and on
behalf of all others similarly situated,

Plaintiffs,

v.

THE KROGER CO. and ACCELLION, INC.

Defendants.

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Case No. 5:21-cv-01887-EJD

**OBJECTIONS BY ANN MARIE
STROHM, MARTIN PINALES, CAREN
BUTLER-ALEXANDER, KAREN AND
MICHAEL GODOVCHIK, AND
ALEXANDER BUCK TO CLASS
ACTION SETTLEMENT**

Hon. Edward J. Davila

OBJECTIONS BY ANN MARIE STROHM, MARTIN PINALES, CAREN BUTLER-ALEXANDER,
KAREN AND MICHAEL GODOVCHIK, AND ALEXANDER BUCK TO SETTLEMENT

Case No. 5:21-CV-01887-EJD

1 Objector: Ann Marie Strohm

2 Address: c/o Markovits Stock & DeMarco, LLC, 3825 Edwards Road, Suite 650
3 Cincinnati, OH 45209

4 Email Address: tcoates@msdlegal.com

5 I, Ann Marie Strohm, am a member of the Class in the above-captioned case. I do not intend
6 to appear at the Final Approval Hearing.

7 /s/ Ann Marie Strohm

8 Objector: Martin Pinales

9 Address: c/o Strauss Troy Co., LPA, Fed. Res. Bldg., 150 E. 4th Street,
10 Cincinnati, OH 45202

11 Email Address: rrsparks@strausstroy.com

12 I, Martin Pinales, am a member of the Class in the above-captioned case. I do not intend to
13 appear at the Final Approval Hearing.

14 /s/ Martin Pinales

15 Objector: Caren Butler-Alexander

16 Address: c/o Federman & Sherwood, 10205 N. Pennsylvania Avenue
17 Oklahoma City, OK 73120

18 Email Address: WBF@federmanlaw.com

19 I, Caren Butler-Alexander, am a member of the Class in the above-captioned case. I do not
20 intend to appear at the Final Approval Hearing.

21 /s/ Caren Butler-Alexander

22 Objectors: Karen and Michael Godovchik

23 Address: c/o Federman & Sherwood, 10205 N. Pennsylvania Avenue
24 Oklahoma City, OK 73120

25 Email Address: WBF@federmanlaw.com

27
28 OBJECTIONS BY ANN MARIE STROHM, MARTIN PINALES, CAREN BUTLER-ALEXANDER,
KAREN AND MICHAEL GODOVCHIK, AND ALEXANDER BUCK TO SETTLEMENT

Case No. 5:21-CV-01887-EJD

1 We, Karen and Michael Godovchik are members of the Class in the above-captioned case. We
2 do not intend to appear at the Final Approval Hearing.

3 /s/ Karen Godovchik

4 /s/ Michael Godovchik

5 Objector: Alexander Buck

6 Address: c/o Federman & Sherwood, 10205 N. Pennsylvania Avenue
7 Oklahoma City, OK 73120

8 Email Address: WBF@federmanlaw.com

9 I, Alexander Buck, am a member of the Class in the above-captioned case. I do not intend to
10 appear at the Final Approval Hearing.

11 /s/ Alexander Buck

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OBJECTIONS BY ANN MARIE STROHM, MARTIN PINALES, CAREN BUTLER-ALEXANDER,
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Case No. 5:21-CV-01887-EJD

1 GROUND FOR OBJECTIONS

2 **I. INTRODUCTION AND BACKGROUND**

3 According to the website created to implement this proposed Settlement, on or around
 4 January 23, 2021 “Kroger learned that an unauthorized user(s) gained access to certain Kroger
 5 customer and current and former employee information, including names, email addresses, phone
 6 numbers, home addresses, dates of birth, Social Security numbers, information to process
 7 insurance claims, prescription information (such as prescription number, prescribing doctor,
 8 medication names, and dates), medical history, certain clinical services, and/or salary-related
 9 information.” See <https://www.krogerftadatabreachsettlement.com/>. The information stolen in this
 10 breach is the most sensitive, personal, and valuable a person has. Accordingly, for almost four
 11 million class members, the damage that can result from this breach is massive.

12 Plaintiffs tout the establishment of a non-reversionary \$5,000,000 common fund. However,
 13 the actual benefit provided to most class members is small—if not completely illusory. From this
 14 fund, Class Counsel seeks attorneys’ fees of \$1,231,628; reimbursement of litigation costs of
 15 \$18,372; Service Awards of \$1,500 for each Plaintiff (i.e., \$4,500); and settlement administration
 16 expenses of \$740,948 to \$827,299. Motion for Attorneys’ Fees (ECF No. 105) at 29; Declaration
 17 of Tina Wolfson (ECF No. 31-5) at ¶ 23. This leaves between \$2,918,201 and \$3,004,552 for the
 18 cascading class member benefits.

19 Importantly, the remaining \$2.9 to \$3 million in the common fund will be paid in a manner
 20 that prioritizes certain benefits over others: “[The] Settlement Administrator will first ... pay for
 21 Credit Monitoring and Insurance Services claimed by Participating Settlement Class Members.”
 22 Settlement Agreement (ECF No. 32) at ¶ 76. According to Plaintiffs, the minimum total value of
 23 each Credit Monitoring and Insurance Services (“CMIS”) subscription is three hundred sixty
 24 dollars (\$360). Declaration of Robert Siciliano (ECF No. 31-4) at ¶8.

25 If funds remain after paying for the CMIS benefits claimed, the Settlement Administrator
 26 will next pay all valid documented loss claims up to \$5,000 per class member. Settlement

27 OBJECTIONS BY ANN MARIE STROHM, MARTIN PINALES, CAREN BUTLER-ALEXANDER,
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Case No. 5:21-CV-01887-EJD

Agreement (ECF No. 32) at ¶¶ 76, 108. If any money remains after the payment of all valid CMIS claims and documented loss claims, then the remaining funds will be split amongst the class members who submitted a claim for the Cash Fund Payment benefit (but not a claim for CMIS or documented loss benefits). Assuming there are funds remaining after the payment of CMIS and documented loss claims, then California residents who filed claims for Cash Fund Payments will receive twice as much for a valid Cash Fund Payment claim as non-California residents. *Id.*

Remarkably, however, neither the class notices nor the written content drafted for the website (e.g., Home Page, the long form notice, and the FAQs) provide class members with any information about the number of class members covered by the Settlement. <https://www.krogerftadatabreachsettlement.com/Content/Documents/Long%20Form%20Notice.pdf>; <https://www.krogerftadatabreachsettlement.com/>.¹ As a result, it is difficult for class members to adequately assess the likelihood that they will actually receive a Cash Fund Payment – given that the class is comprised of nearly four million individuals. This means that the terms of this settlement require class members to release all their claims against Kroger in exchange for the possibility of receiving a Cash Fund Payment – a benefit they cannot reasonably assess the likelihood of actually receiving.

II. ARGUMENT

Under Rule 23, a district court may approve a class action settlement “only after a hearing and only on finding that it is fair, reasonable, and adequate” Fed. R. Civ. P. 23(e)(2); see *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003). “In approving a proposed class action settlement, the district court has a fiduciary responsibility to ensure that ‘the settlement is fair and not a product of collusion, and that the class members’ interests [are] represented adequately.’” *Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1078 (2d Cir. 1995) (quotation omitted). The

¹ Under the “Documents” tab of the website is a link to certain case documents such as the Settlement Agreement and the Motion for Preliminary Approval that do mention the 3.82 million class members.

1 purpose of this requirement is “the protection of those class members ... whose rights may not
 2 have been given due regard by the negotiating parties.” *Officers for Justice v. Civil Serv. Comm’n*,
 3 688 F.2d 615, 624 (9th Cir. 1982).

4 The proposed settlement here requires a higher level of scrutiny because it was reached
 5 prior to class certification. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620-21 (1997); *In*
 6 *re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458 (9th Cir. 2000). “With less information about
 7 the class, the judge cannot as effectively monitor for collusion, individual settlements, buy-offs
 8 (where some individuals use the class action device to benefit themselves at the expense of
 9 absentees), and other abuses.” *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liability*
 10 *Litig.*, 55 F.3d 768 (3d Cir. 1995); accord *Acosta v. Trans Union, LLC*, 243 F.R.D. 377, 397 (C.D.
 11 Cal. 2007). Extra scrutiny is also required because the parties are no longer in an adversarial
 12 posture, and in light of the inherent tension attributable to class counsel’s self-interest in achieving
 13 a settlement that, like this one, involves a substantial proposed attorneys’ fee award in an
 14 unlitigated case. See *Staton*, 327 F.3d at 959-60; see also *Powers v. Eichen*, 229 F.3d 1249, 1256
 15 (9th Cir. 2000). This concern is especially relevant where, as here, a settlement offers relatively
 16 low amounts of compensation to the class, if any. See *Mars Steel Corp. v. Cont’l Ill. Nat’l Trust*
 17 *Co.*, 834 F.2d 677, 681 (7th Cir. 1984).

18 **A. The Settlement Value is Too Low Compared to Similar Cases and Was Hastily**
 19 **Negotiated in Less than Sixty Days**

20 Plaintiffs state in their Motion for Final Approval that, “[b]ased on the size of the breach
 21 and per-capita figures, the Settlement presents a robust relief package and valuable outcome for
 22 the Settlement Class compared to other recent data breach class action settlements.” Motion for
 23 Final Approval (ECF No. 104) at 18-19 (citing *In re The Home Depot, Inc. Customer Data Sec.*
 24 *Breach Litig.*, No. 1:14-MD-02583, 2016 WL 6902351, at *7 (N.D. Ga. Aug. 23, 2016); *In re*
 25 *Target Corp. Customer Data Sec. Breach Litig.*, MDL No. 14-2522, 2017 WL 2178306, at *1-2
 26 (D. Minn. May 17, 2017); *In re LinkedIn User Priv. Litig.*, 309 F.R.D. 573, 582 (N.D. Cal. 2015)).

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 28 OBJECTIONS BY ANN MARIE STROHM, MARTIN PINALES, CAREN BUTLER-ALEXANDER,
 KAREN AND MICHAEL GODOVCHIK, AND ALEXANDER BUCK TO SETTLEMENT

Case No. 5:21-CV-01887-EJD

1 This is simply not true. The common fund is meager compared to the size of the class (3.82 million
 2 members) and the highly sensitive nature of the data involved (e.g., full names, home addresses,
 3 dates of birth, Social Security numbers, information to process insurance claims, prescription
 4 information (such as prescription number, prescribing doctor, and medication names), and medical
 5 records). The highly personal and sensitive information stolen in this breach sets it apart from the
 6 vast majority of data breaches.

7 Notably, the breaches in *Home Depot*, *Target*, and *LinkedIn* upon which Plaintiffs rely
 8 contained only passwords or personal payment information that could be easily changed. See
 9 *Home Depot*, No. 1:14-md-02583, ECF No. 93, ¶ 2 (N.D. Ga.) (payment card data breach); *Target*,
 10 MDL No. 14-2522, ECF No. 258 (D. Minn.) (same); *LinkedIn*, 309 F.R.D. at 581 (account
 11 password data breach). The cases upon which Plaintiffs rely actually demonstrate why the
 12 settlement here is inadequate.

13 For example, in *LinkedIn*, where the most sensitive data exposed was passwords, the
 14 800,000 class members were able to submit claims for pro-rata cash compensation from a \$1.25
 15 million common fund. *LinkedIn*, 309 F.R.D. at 581-82.² In *Home Depot*, which only involved
 16 payment card information, the defendant paid for credit monitoring separate from the common
 17 fund so that these payments did not reduce the cash recovery by class members, which allowed
 18 reimbursement of documented losses up to \$10,000. *Home Depot*, 2016 WL 6902351, at *4, 6.
 19 The settlement in *Target* similarly provided cash reimbursements of documented losses up to
 20 \$10,000 per class member. *In re Target Corp. Customer Data Sec. Breach Litig.*, MDL 14-2522
 21 (PAM), 2017 WL 2178306, at *2 (D. Minn. May 17, 2017). Moreover, in *Target*, unlike here, the
 22 payment of attorneys' fees, costs, and settlement expenses was separate from the common fund so

23 ² In several filings, including sworn declarations, Plaintiffs incorrectly refer to the size of the
 24 class in *LinkedIn* as 6.4 million class members. See, e.g., Motion for Preliminary Approval (ECF
 25 No. 31) at 33; Declaration of Tina Wolfson in Support of Preliminary Approval (ECF No. 31-5)
 26 at ¶ 40; Motion for Final Approval (ECF No. 104) at 19. In reality, the size of the class in *LinkedIn*
 was only 800,000. *In re LinkedIn User Priv. Litig.*, 309 F.R.D. 573, 581 (N.D. Cal. 2015) ("The
 size of the class amounts to approximately 800,000 individuals.").

27 OBJECTIONS BY ANN MARIE STROHM, MARTIN PINALES, CAREN BUTLER-ALEXANDER,
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Case No. 5:21-CV-01887-EJD

1 that these payments did not reduce the class member recoveries. *In re Target Corp. Customer Data*
 2 *Sec. Breach Litig.*, 892 F.3d 968, 972 (8th Cir. 2018).

3 Here, however, the common fund may be extinguished by the payment of nothing more
 4 than attorneys' fees, costs, expenses, and claims for CMIS. Although Plaintiffs assign a \$360 retail
 5 value to each CMIS subscription, "[C]ourts widely recognize that 'compensation in kind is worth
 6 less than cash of the same nominal value.'" *Acosta v. Trans Union, LLC*, 243 F.R.D. 377, 390
 7 (C.D. Cal. 2007)(citation omitted). Moreover, to the extent there is any money left over after the
 8 payment of fees, costs, expenses, and CMIS benefits, class members with documented losses will
 9 have their compensation capped at \$5,000 (unlike the \$10,000 cap in *Target* and *Home Depot*).
 10 Because the benefits provided by this settlement will be provided in a cascading manner, this
 11 settlement is inferior to other settlements typically afforded class members in data breach cases
 12 involving Social Security numbers and/or protected health information. See ECF No. 89-1.

13 The inadequacy of the settlement is further highlighted by the haste with which the
 14 settlement was negotiated. *See Acosta*, 243 F.R.D. at 396 ("In considering a proposed settlement,
 15 a court therefore bears an obligation to evaluate the scope and effectiveness of the investigation
 16 plaintiffs' counsel conducted prior to reaching an agreement."). Here, the parties agreed to a
 17 settlement less than two months after the case was filed and without the benefit of formal
 18 discovery.

19 **B. The Notice Program Aims for a Paltry Claims Rate**

20 Plaintiffs project a claims rate of between 1% and 3%. ECF No. 104 at 17. However, when
 21 the names, mailing addresses, and email addresses for class members are readily available, as is
 22 the case here, a much higher claim rate should be anticipated and achieved. *See In re Facebook*
 23 *Biometric Info. Priv. Litig.*, No. 15-CV-03747-JD, 2021 WL 757025, at *2 (N.D. Cal. Feb. 26,
 24 2021) (consumer class actions have a median claims rate of 9% and a weighted mean of 4%);
 25 *Culbertson et al v. Deloitte Consulting LLP*, No. 1:20-cv-03962-LJL (SDNY), ECF Nos. 151-152
 26 (data exposure settlement with a 9.5% claims rate following U.S. mail, email, and reminder emails

27 OBJECTIONS BY ANN MARIE STROHM, MARTIN PINALES, CAREN BUTLER-ALEXANDER,
 28 KAREN AND MICHAEL GODOVCHIK, AND ALEXANDER BUCK TO SETTLEMENT

Case No. 5:21-CV-01887-EJD

notice campaign); *In re LinkedIn User Priv. Litig.*, 309 F.R.D. 573, 581-582 (N.D. Cal. 2015)(5.9% claims rate). Plaintiffs' lack of enthusiasm to maximize class member claims is not surprising given that only \$2.9 to \$3 million is projected to be available to pay claims. As discussed below, even assuming a low 2% claims rate, there is a substantial likelihood that the cascade payment process will deplete the settlement funds before any Cash Fund Payments are made. This, of course, underscores the earlier objection that the \$5 million settlement value is too low.

C. Class Members Seeking the Cash Fund Payment Benefit Likely Will Receive Very Little Money, and Perhaps Nothing

According to Plaintiffs' Motion for Final Approval, "[a]s of January 7, 2022, 38,823 claims have been submitted, and the Parties expect the number of claims submitted to increase through the remainder of the claims period." Motion for Final Approval (ECF No. 104) at 15. With roughly two months from January 7, 2022 for class members to submit additional claims, and assuming multiple reminder emails have been or will be issued to the class as is required by the Settlement Agreement (ECF No.32), ¶88 ("For any Settlement Class Member for whom the Settlement Administrator has an email address, and who has not submitted a Valid Claim Form, the Settlement Administrator *shall transmit periodic email reminders* of the opportunity to file a Claim Form prior to the Claim Deadline.")(emphasis added), it is reasonable to assume that approximately 75,000 claims will be submitted by the March 5, 2022 claim deadline.

The cascading claim payment process adopted by Plaintiffs requires the payment of all valid CMIS claims first, then the payment of all valid documented loss payment claims, then the payment of all valid Cash Fund Payment claims. Settlement Agreement (ECF No. 32), ¶76. As mentioned previously, according to Plaintiffs, the minimum retail value of each CMIS subscription is three hundred sixty dollars (\$360). Declaration of Robert Siciliano (ECF No.31-4) at ¶8. While Plaintiffs apparently have not disclosed the actual cost the Settlement Fund will pay for the Experian and Identity Works Credit 3-Bureau CMIS Plan, it is likely a flat rate based upon the 3.8

OBJECTIONS BY ANN MARIE STROHM, MARTIN PINALES, CAREN BUTLER-ALEXANDER,
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Case No. 5:21-CV-01887-EJD

1 million class members eligible to claim this benefit.³ Based upon their prior experience in this
 2 type of litigation and other data breach class action settlements, Counsel for Objectors estimate
 3 that a flat rate charge to be paid for the CMIS benefit given that there are 3.8 million class members
 4 could be \$1,500,000. This expense would reduce the Net Settlement Fund to approximately \$1.4
 5 million.

6 The second claims to be paid are valid Documented Loss Payment claims. Each valid
 7 Documented Loss Payment Claim is capped at \$5,000 regardless of the injury suffered. *Cf.* ECF
 8 No. 27 ¶ 251, *In re Data Breach Security Litig. Against Kroger Co.*, No. 1:21-CV-00146 (S.D.
 9 Ohio Jul. 22, 2021) (alleging one class member suffered \$10,000 in damages). If only 0.4% of the
 10 75,000 estimated total claims include valid Documented Loss Payment claims, each capped at
 11 \$5,000, those claims would equal \$1.5 million and would deplete the remaining \$1.4 million in
 12 the Net Settlement Fund.⁴ Likewise, if only 6% of the 75,000 estimated total claims include valid
 13 Documented Loss Payment claims, each with an average value of \$325, those claims would equal
 14 \$1.46 million and would also deplete the remaining \$1.4 million in the Net Settlement Fund.⁵
 15 Under both scenarios, \$0 would be available to pay the tens-of-thousands of class members who
 16 filed valid claims for the Cash Fund Payment Benefit. And, in exchange for receiving nothing,
 17 these same claimants will provide Kroger with a complete release of their claims.

18 For these reasons, Class Members Ann Marie Strohm, Martin Pinales, Caren Butler-
 19 Alexander, Karen and Michael Godovchik, and Alexander Buck object to this settlement.

20 3 In the unlikely event that the Net Settlement Fund will be charged the retail price of \$360
 21 for each class member who validly claims this benefit, the \$2.9 to \$3 million Net Settlement Fund
 22 value would quickly become depleted after paying only 8,055 to 8,333 CMIS claims (which is
 23 only about 11% of the 75,000 claims Counsel for Objector estimate will be filed). Even if the Net
 24 Settlement Fund negotiated a substantial discount off the retail price for each CMIS claim selected
 25 and will pay \$150 per claim, if 20% of the anticipated 75,000 claims select the CMIS benefit, the
 cost to the Net Settlement Fund would be \$2,250,000 (.20 * 75,000 * \$150). This would leave
 only \$150,000 to pay valid Documented Loss Payment claims and valid Cash Fund Payment
 claims.

26 4 $0.004 * 75,000 \text{ claims} * \$5,000 / \text{claim} = \$1,500,000.$

27 5 $0.06 * 75,000 \text{ claims} * \$325 / \text{claim} = \$1,462,500.$

28 OBJECTIONS BY ANN MARIE STROHM, MARTIN PINALES, CAREN BUTLER-ALEXANDER,
 KAREN AND MICHAEL GODOVCHIK, AND ALEXANDER BUCK TO SETTLEMENT

Case No. 5:21-CV-01887-EJD

DATED: February 18, 2022

By: /s/ Courtland L. Reichman

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OBJECTIONS BY ANN MARIE STROHM, MARTIN PINALES, CAREN BUTLER-ALEXANDER,
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Case No. 5:21-CV-01887-EJD

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KAREN AND MICHAEL GODOVCHIK, AND ALEXANDER BUCK TO SETTLEMENT

Case No. 5:21-CV-01887-EJD